tute for process, such as the requirement that non-residents give security for costs.[5] But the New York rule,[6] supported by the great weight of authority,[7] is that where residence is prescribed "as a qualification for the enjoyment of a privilege" it must be interpreted to mean domicile. And domicile is the only test of citizenship in one state of the Union rather than another. "A citizen of the United States residing in any state of the Union," says Chief Justice Marshall,[8] "is a citizen of that state," and the Fourteenth Amendment bears him out. The distinction of the New York and South Carolina courts between "resident" and "citizen" would, therefore, seem to be merely verbal, and insufficient to support their decisions.

These decisions and the principal case may, however, be supported on a broader ground. In the case of McCready *v.* Virginia,[9] the constitutionality of a statute forbidding non-residents to take oysters from Virginia waters was in question. In sustaining the statute, the Supreme Court of the United States declared that, to come within the meaning of Art. 4, § 2, a privilege must be "in its nature fundamental, belonging of right to the citizens of all free governments"; and that the right to fish in Virginia waters is not such a privilege, belonging, as it does, to a citizen of Virginia by virtue, not of general citizenship, but of citizenship confined to a particular locality. The same is true of many other "privileges and immunities" to which the constitution has never been thought to apply, such as the right to vote in a particular state, or to use its public schools. So of the right to sue non-residents in state courts. The privilege to seek redress in the courts is fundamental; but the right to seek redress in one particular set of courts is an incident of local, not of general, citizenship, and seems, therefore, not to differ from the right in question in McCready *v.* Virginia. And if the question were presented to the Supreme Court, its decision, not its *dicta*, would probably prevail.

RECENT CASES.

ADVERSE POSSESSION — GAINING OF TITLE BY THE GOVERNMENT. — The United States bought land at an administrator's sale and continued in possession, openly using the land for a cemetery, during the period prescribed by the statute of limitations. The sale was later found to have been void, and an action to try title was brought against the defendant, who had derived his title from the United States. *Held*, that the defendant has a valid title, since the United States had acquired title by adverse possession. *City of El Paso* v. *Ft. Dearborn Nat. Bank*, 74 S. W. Rep. 21 (Tex., Sup. Ct.).

Adverse possession carries with it a right in the land, good against all the world except the true owner. Unless the true owner asserts his right within the period of the statute of limitations, he is debarred, and the occupant's title becomes complete. Since no action lies against the sovereign, it has been laid down that the statute will not operate in favor of the government. *San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep. 708. As a rule of law, however, this affords an unsatisfactory test, for in many cases the owner has a means of recovering his land. It is inapplicable where the government is by statute liable to suit. *Baxter* v. *State*, 10 Wis. 454. Often, as in

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[5] See Haggart *v.* Morgan, 5 N. Y. 422.
[6] People *v.* Platt, 117 N. Y. 159.
[7] Jacob, Dom. § 75, and cases cited.
[8] Gassies *v.* Ballon, 6 Pet. (U. S.) 761.
[9] 94 U. S. 391.

the principal case, action may be maintained against the agents of the government. *United States* v. *Lee*, 106 U. S. 196. The better view seems to be that the government may gain title wherever legal proceedings could have been instituted within the prescribed time either against the government or its agents. *Stanley* v. *Schwalby*, 147 U. S. 508. The principal case, therefore, may be supported both on principle and on authority.

AGENCY — SCOPE OF AGENT'S AUTHORITY — INCIDENTAL POWER. — An agent having written authority from his principals to execute policies in their name and on their behalf, in order to aid an insolvent company in which he was personally interested, wrongfully issued a policy to the plaintiff guaranteeing the payment of certain sums due from the company to the plaintiff. *Held*, that the plaintiff cannot recover upon the policy. *Hambro* v. *Burnand*, [1903] 2 K. B. 399.

It is held in England that a principal is not liable for the misrepresentations of his agent made in the course of his principal's business to further the agent's own private ends. *British Mutual Banking Co.* v. *Charnwood Forest R. Co.*, 18 Q. B. D. 714. As this was a decision of the Court of Appeal, it is not surprising that the divisional court in the principal case should have applied the same rule to contracts. It is submitted, however, that the decisions are, on principle, objectionable. They introduce into the law of agency a false test of liability, namely, benefit or harm to the principal. If an act is within an agent's power, either express or incidental, it surely ought to make no difference, as between the principal and the third party, whether it was for the benefit of the principal or for the sole benefit of the agent. It is believed that the agent in the principal case acted within his incidental power and that the policy should have been held binding upon the principal. *Cf. North River Bank* v. *Aymar*, 3 Hill 262.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS BROUGHT BY ATTACHING CREDITOR. — Three creditors, who had an attachment of less than four months' standing on a debtor's property, petitioned that he be adjudged a bankrupt. *Held*, that the petition is valid, though the attachment must be released before an adjudication. *Re Hornstein*, 122 Fed. Rep. 266 (Dist. Ct., N. D., N. Y.).

The Bankruptcy Act of 1898, § 59 b, provides that three or more persons who have provable claims against any person may file a petition to have him adjudged a bankrupt. In various other sections of the act a distinction is made between proof and allowance of claims. Thus a creditor by § 57 a may prove for any just debt owed him, but by § 57 g his claim will not be allowed until he has surrendered any preference he may have. An attachment claim such as that of the creditors in the principal case is classed as a preference. *Re Schenkein*, 113 Fed. Rep. 421. Their claim then is not allowable. The court, however, carrying out the distinction, says it is provable, and by a strict interpretation of § 59 b, holds that the creditors may file their petition. Heretofore the words "provable claim" have usually been given a different meaning when used in this connection. Before the Act of 1898 they were interpreted as denoting a claim that would be allowed. *Ecker* v. *McAllister*, 45 Md. 290. It seems probable that that is what they mean in this section, and such is the result reached by previous cases. *Re Burlington Malting Co.*, 109 Fed. Rep. 777.

BANKRUPTCY — PRIORITY OF CLAIMS — EXPENSES OF ASSIGNEE UNDER PRIOR ASSIGNMENT. — A general assignment for the benefit of creditors was made void by a bankruptcy petition filed within four months. Legal services had been rendered the assignee. *Held*, that so far as such services have benefited the estate, reasonable claims for compensation should be allowed and are entitled to priority over claims of creditors. *Randolph & Randolph* v. *Scruggs*, 23 Sup. Ct. Rep. 710.

The court in determining the validity of the claims here involved decides a much disputed question. The controlling principles are the same as those governing the assignee's own right to compensation, for which see 15 HARV. L. REV. 578. There is also a conflict as to whether the claims here allowed should rank ahead of ordinary debts. It has been held that such obligations, though incurred by the assignee, are debts of the bankrupt, and are not entitled to priority under any provision of the act. *In re Mays*, 114 Fed. Rep. 600. This decision overlooks, however, the equitable basis on which these claims rest. The assignee himself would have a right of reimbursement from the trust funds to the extent of the sums profitably expended in preserving them. *Clark* v. *Sawyer*, 151 Mass. 64. The claimants are allowed to enforce this right of the assignee. *Central R. R. & B'k'g Co.* v. *Pettus*, 113 U. S. 116. The trustee in bankruptcy consequently received the funds subject to an equitable lien in their favor, and the principal case rightly takes care of this equitable claim before dividing the fund among the creditors.

BANKRUPTCY — PROCEDURE — APPEAL TO SUPREME COURT. — A decree of a district court in bankruptcy proceedings was taken to the Circuit Court of Appeals by a petition for revision. From the decision of that court an appeal to the Supreme Court is claimed, although no question is involved that would be appealable from the highest court of a state. *Held*, that the right of appeal does not exist. *Hutchinson* v. *Otis, Wilcox & Co.*, 123 Fed. Rep. 14 (C. C. A., First Circ.).

The claim was that a right of appeal existed under the Evarts Act, which regulates appeals in general from the Circuit Court of Appeals. U. S. Comp. St. 1901, p. 547. This contention finds support in one case where an appeal was allowed without question under similar circumstances. *Pirie* v. *Chicago Co.*, 182 U. S. 438. The principal case, however, which appears to be the first in which the question was expressly considered since the present bankruptcy act, seems to interpret the statutes correctly. Sec. 25 of the Bankruptcy Act appears to contain an exclusive provision as to such appeals, and requires some question appealable from the supreme court of a state. Moreover the Evarts Act apparently refers only to suits, and bankruptcy proceedings are only parts of a single suit composed of all such proceedings. *Wiswall* v. *Campbell*, 93 U. S. 347. Such appeals were refused under the previous act. *Conro* v. *Crane*, 94 U. S. 441. The general opinion has been in accord with the decision in the principal case that the present act makes no change. See note, 43 C. C. A. 9.

CHECKS — DRAWING ON SPECIAL FUND — EQUITABLE ASSIGNMENT. — A contractor maintained a special fund for the payment of wages, and a bank, other than the depositary, advanced on checks drawn upon that fund money to be used in the payment of wages. Before the checks were paid the drawer became bankrupt. *Held*, that the bank prevails, as against the trustee in bankruptcy, for that portion of the fund covered by the checks. *Fortier* v. *Delgado & Co.*, 122 Fed. Rep. 604 (C. C. A., Fifth Circ.). See NOTES, p. 52.

CHOSES IN ACTION — ASSIGNMENT. — A consignor of goods for sale directed the consignee by mail to pay a portion of the proceeds to a creditor of the consignor. Before the arrival of the letter the consignor became bankrupt and his trustee by telegram countermanded the direction. *Held*, that the creditor prevails against the trustee as to the proceeds of the sale in question. *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208. See NOTES, p. 52.

CONSTITUTIONAL LAW — EXEMPTION OF FEDERAL AGENCIES FROM STATE CONTROL. — A strip of land in the state of Minnesota was granted by Congress to the plaintiff railroad for the construction of its line. By the same act the railroad was incorporated and made a post route and military road subject to government use. A portion of the strip was held by the defendants adversely for the period required by the Minnesota statute of limitations. *Held*, that the plaintiff can recover the land in ejectment. *Northern Pacific R. Co.* v. *Townsend*, 23 Sup. Ct. Rep. 671.

It is recognized law that the instrumentalities created by the general government in the exercise of its constitutional powers may not be impaired nor their efficiency lessened by state taxation. *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316. Thus United States securities may not be taxed, *Weston* v. *Charleston*, 2 Pet. (U. S.) 449; nor patent rights, *In re Sheffield*, 64 Fed. Rep. 833; nor the franchise of a railroad chartered by the government, *California* v. *Pac. R. R. Co.*, 127 U. S. 1. The power of the state to legislate in other directions is similarly limited. Thus a Soldiers' Home maintained by the government is not subject to state food laws. *In re Thomas*, 82 Fed. Rep. 304. The principal case is a striking application of this principle. The court argues that to allow any portion of the right of way to be parted with by the railroad voluntarily or involuntarily would nullify the purpose of the Act of Congress, and therefore state laws, even so fundamental as those governing the acquisition of real property, must yield. It should be noted that the case is no authority on the general question whether title by adverse user can be gained to land in the right of way of a railroad not operating under a federal charter. For a discussion of that question see 15 HARV. L. REV. 146.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RESTRICTIONS UPON LABOR CONTRACTS. — The New York legislature passed a statute prohibiting any person or corporation contracting with the state or a municipal corporation from requiring more than eight hours for a day's work. *Held*, that the statute is invalid, since it is an unreasonable exercise of the police power and takes property without due process of law. *People* v. *Orange, etc., Co.*, 175 N. Y. 84.

The Indiana legislature enacted that unskilled labor employed on any public work of the state, counties, cities, and towns shall receive not less than twenty cents an hour.

Held, that the statute is unconstitutional, since it infringes upon the right of municipalities to contract, and takes property without due process of law. *Street* v. *Varney, etc., Co.*, 66 N. E. Rep. 895 (Ind., Sup. Ct.). See NOTES, p. 50.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO SUE IN STATE COURTS. — The plaintiff was injured in Connecticut by the defendant's automobile, and brought suit in New York. Both parties were residents of Connecticut. *Held*, that the court may refuse to take jurisdiction. *Collard* v. *Beach*, 81 N. Y. App. Div. 582. See NOTES, p. 54.

CONTRACTS — IMPLIED PROMISE NOT TO PREVENT PERFORMANCE — INSURANCE CONTRACT. — The plaintiff was insured for $5000 by the defendant corporation. The defendant passed a by-law limiting the amount payable upon all existing policies to $2000 and refused to accept premiums upon a larger basis. *Held*, that since the contract was to pay at the death of the plaintiff, there was no present breach. *Porter* v. *American Legion of Honor*, 183 Mass. 326. See NOTES, p. 46.

CONTRIBUTORY NEGLIGENCE — LAST CHANCE RULE. — The plaintiff, while negligently crossing a street-car track, was struck by the defendant's electric car. The evidence tended to show that the car was running at an illegal rate of speed, and that, had the speed been lawful, the motorman might have avoided the accident. *Held*, that, assuming the evidence to be true, the plaintiff's contributory negligence is no defense. *Moore* v. *St. Louis Transit Co.*, 75 S. W. Rep. 699 (Mo. App.).

The doctrine that a plaintiff is barred by contributory negligence is extended even to cases where the defendant himself is acting illegally. It is generally limited, however, by allowing recovery, if, after the plaintiff's negligence, the defendant can prevent the injury, but does not. The principal case extends this limitation to cases in which the defendant ought to be able to avoid the injury, and could do so, but for his own prior negligence. It is based largely on a previous case in the Supreme Court of Missouri, in which, on rehearing, four of the seven judges seem to favor such an extension. See *Sullivan* v. *Missouri Pac. Ry. Co.*, 117 Mo. 214. But it is apparently in conflict with a later decision of the same court. *Watson* v. *Mound City Ry. Co.*, 133 Mo. 246. The case seems but an instance of a growing tendency to bar out consideration of the plaintiff's negligence by an extension of the so-called "last chance rule." *Cf. Roberts* v. *Spokane St. Ry. Co.*, 23 Wash. 325; *Thompson* v. *Salt Lake Rapid Transit Co.*, 16 Utah 281. The tendency is in the right direction, for without it a premium is placed on violating the law, and a company is allowed to plead its own wrongdoing in its defense.

CORPORATIONS — DIRECTOR'S LIABILITY TO DISCLOSE MATERIAL FACTS WHEN PURCHASING STOCK. — A director of a corporation purchased stock without disclosing to the stockholder material facts, known to him as director, which were certain to raise the value of the stock if generally known. *Held*, that the sale will be set aside as fraudulent. *Oliver* v. *Oliver*, 45 S. E. Rep. 232 (Ga.). *Held*, that the sale will not be set aside as fraudulent. *O'Neile* v. *Ternes*, 73 Pac. Rep. 692 (Wash.).

Ordinarily, if the parties to a sale bear no fiduciary relation to one another, the fact that one fails to disclose material facts of which the other is ignorant does not affect the validity of the sale. *Laidlaw* v. *Organ*, 2 Wheat. (U. S.) 178. In the principal cases, however, the defendant is director in a corporation, and as such is a trustee for the corporation and owes it such duties as a trustee owes his *cestui que trust*. *Wardell* v. *R. R. Co.*, 103 U. S. 651. He is not, however, a trustee for the stockholders. Yet if we go behind the legal fiction of the corporate existence, as the courts do in proper cases, we at once see that the stockholder is the real party in interest, and it seems fair to say that the director, though not his trustee, is in a fiduciary relation to him. A fiduciary may not deal for his own benefit with the property concerned without a full disclosure of all the facts. *Van Epps* v. *Van Epps*, 9 Paige (N. Y.) 237. Accordingly it would seem that the court is right in the first principal case in holding that the director purchasing stock must disclose to the stockholder facts tending to increase its value. The second, however, represents the weight of authority. *Board of Commissioners of Tippecanoe Co.* v. *Reynolds*, 44 Ind. 509.

CORPORATIONS — LIABILITY OF, AS AFFECTED BY PRIVATE RIGHT OF MAJORITY STOCKHOLDER. — A corporation contracted to furnish articles of a particular description. The owner of a patent obtained an injunction forbidding the corporation to sell such articles on the ground that their sale would infringe his patent. Later the patentee obtained control of the corporation through a purchase of its stock.

Held, that the restraining injunction is unavailable to the corporation as a defense to an action for a breach of the contract. *McElroy* v. *American Rubber Tire Co.*, 122 Fed. 441 (Circ. Ct., Second Circ.).

The court takes the position that the purchase of a controlling interest by the patentee deprived the corporation of the defense which the injunction would otherwise have afforded it. It is well settled that a purchase of all the stock of a corporation does not render any less distinct the difference between the personalities of the stockholder and of the corporation. *Parker* v. *Bethel Hotel Co.*, 96 Tenn. 252. Nor can there be any doubt that a stockholder may sue a corporation for infringement of his patent rights. See *Pierce* v. *Partridge*, 44 Mass. 44. If these two principles are conceded, it is difficult to justify the decision in the principal case. The corporation is just as distinct in individuality from the owner of the patent as it was before he acquired its stock, and it is as impossible for it to perform its contract, without placing itself in contempt, as it then was. Since the stockholder is under no duty to give the corporation the benefit of his patent, it seems unreasonable to inflict an indirect punishment upon him for failing to do so Furthermore the decision imposes hardship on the minority stockholders, who have had no connection with the transaction.

CORPORATIONS — NATURE OF CORPORATIONS — THEORY OF SEPARATE ENTITY. — A membership corporation sued for an injunction against prospective acts of violence on the part of a labor union, which threatened to injure the businesses of the individual members of the corporation. No injury to corporate property was threatened. *Held*, that the injunction will be granted. *Horseshoers' Protec. Ass'n* v. *Quinlivan*, 83 N. Y. App. Div. 459. See NOTES, p. 49.

DEATH BY WRONGFUL ACT — DEFENSES TO STATUTORY LIABILITY — RECOVERY BY OTHER HEIRS. — A statute granted an action for wrongful death to the "heirs or personal representatives" of the deceased. Another statute provided that an unborn child should be "deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth." While the plaintiff, of whose existence the defendant was ignorant, was as yet unborn, the plaintiff's mother recovered a judgment against the defendant, as heir of her husband, the plaintiff's father. *Held*, that the plaintiff is barred by the previous action. *Daubert* v. *Western Meat Co.*, 73 Pac. Rep. 244 (Cal.).

Although the present case expressly leaves the question open, it has elsewhere been held that even though a statute similar to the above is ordinarily construed as contemplating but one action, yet if the defendant, knowing of other parties in interest, allows an action under it to go to judgment without insisting that all such parties be joined, the statute will not be considered a bar to subsequent actions by such parties as were not guilty of laches. *Galveston, etc., R. Co.* v. *Kutac*, 72 Tex. 643. Granting that position sound, the present case must rest upon the fact that the plaintiff's existence was, entirely without his fault, unknown to the defendant at the time of the original suit. That fact, however, seems a somewhat unsatisfactory ground upon which to bar the plaintiff from recovering for a loss which the defendant's negligence has plainly caused him to suffer. The supreme court of Texas, upon almost identical facts, held that the plaintiff was not barred by the previous recovery; and such a rule would seem preferable to that of the principal case. *Nelson* v. *Galveston, etc., R. Co.*, 78 Tex. 621.

GOOD-WILL — RIGHTS OF PURCHASER TO USE FIRM NAME. — One member of a firm doing business under the name of J. & J. Slater died. In an action by his executrix for an accounting and distribution of the firm property the court decreed a sale of the firm assets and good-will. The surviving partner desired the decree to forbid the continued use of the old firm name by any other possible purchasers than himself. *Held*, that the sale should be without limitation in this regard. *Slater* v. *Slater*, 175 N. Y. 143.

Undoubtedly, the name of an old and established firm attracts customers of itself. Consequently the right of third parties purchasing the good-will to retain the old name would tend to enhance their bids at the sale of the business, and would thus directly benefit the estate of the deceased partner. Nor would the surviving partner seem to have any just cause for complaint. Proper notice of the change of ownership would relieve him from all possible liability. *Cox* v. *Pearce*, 112 N. Y. 637. After a judicial sale of the good-will he could be enjoined by the purchasers from employing the name to his own advantage, even though the purchasers did not themselves continue to use it. *Churton* v. *Douglas*, John. 174; *Hegeman Co.* v. *Hegeman*, 8 Daly (N. Y.) 1. To deny the purchasers the right to the name could, therefore, result only in its annihilation to the direct injury of the sellers, and to the benefit of no one. Conse-

quently the decision appears an entirely desirable one. It also accords with the weight of authority. *Snyder M'f'g Co.* v. *Snyder*, 54 Oh. St. 86. The earlier New York decisions, however, were to the contrary. *Mason* v. *Dawson*, 37 N. Y. Supp. 90.

INFANTS — AVOIDING CONTRACT — RETURN OF CONSIDERATION. — An infant made a contract of purchase from another infant, and paid the consideration. After the seller had spent the money, the purchaser elected to avoid the agreement, and brought action for the money paid in contract and in tort for conversion. *Held*, that infancy is a good defense to the action in contract, and that there is no tortious conversion. *Drude* v. *Curtis*, 67 N. E. Rep. 317 (Mass.).

It is well settled that an infant can avoid his contracts, except for necessaries, even though they are executed upon the other side, without returning the consideration or its equivalent. *Chandler* v. *Simmons*, 97 Mass. 508. If, however, he still retains the consideration in his possession, he may, upon demand and refusal, be held liable for conversion. *Fitts* v. *Hall*, 9 N. H. 446. If, on the other hand, as in the principal case, the infant has spent the consideration, text-books and *dicta* agree that the other party is remediless. See TYLER ON INFANCY § 37; *Fitts* v. *Hall*, *supra*. The present case, however, is the only one met with where the facts have been so peculiar as to bring the point squarely before the court for decision; and although the principles involved are elementary, it forms an interesting addition to that part of the law which deals with the protection of infants in their contractual relations. With regard to the count in conversion, the court takes the apparently sound position that as the plaintiff must have expected and in effect consented that the defendant should deal with the consideration as his own, the latter committed no tort in disposing of it. *Dill* v. *Bowen*, 54 Ind. 204.

INNKEEPERS — EXTENT OF LIABILITY — LOSS OF GUEST'S PROPERTY. — The plaintiff's property was destroyed by fire while he was a guest at the defendant's hotel. *Held*, that the innkeeper is *prima facie* liable, but may discharge himself by showing that the loss was due to the fault of neither himself nor his servants. *Johnson* v. *Chadbourn Finance Co.*, 94 N. W. Rep. 874 (Minn.). See NOTES, p. 47.

LAW AND FACT — PROVINCE OF COURT AND JURY — DETERMINATION OF REASONABLENESS. — The city of Philadelphia imposed a license charge on the poles of a telegraph company engaged in interstate commerce. *Held*, that the reasonableness of such a charge is for the jury. *Atlantic, etc., Co.* v. *Philadelphia*, 23 Sup. Ct. Rep. 817.

A city has the right to impose such a license charge, if the amount corresponds to the reasonable expense for inspection and regulation. *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419. The principal case raises the point as to how the reasonableness shall be determined. Questions of reasonableness are commonly said to be questions of fact for the jury. In certain kinds of questions this is true, *e.g.*, questions of reasonable care or reasonable time. *Gerdes* v. *Christopher & Simpson Co.*, 124 Mo. 347. Where, however, the question is as to the reasonableness of some legislative act, and on this depends its legality, reasonableness has generally been held a question for the court. So the reasonableness of a municipal ordinance is commonly held to be for the court to decide. *Austin* v. *Murray*, 16 Pick. (Mass.) 121. In the principal case, the court admits this as a general rule, but limits it to cases where the reasonableness of the character of an ordinance is in question, as distinguished from cases where the reasonableness of the amount of the charge fixed by an ordinance is concerned. The distinction taken by the court seems of doubtful value, and is inconsistent with the established rule that the reasonableness of rates fixed by the legislature for public service companies is for the court. *Steenerson* v. *Great Northern R. Co.*, 69 Minn. 353.

LIBEL — PRIVILEGED COMMUNICATION. — The plaintiff sued the board of health of a village for the publication of a libel contained in the preamble to an ordinance of the board. The defense was privilege. *Held*, that the statement in the preamble, not being essential to the accomplishment of the object sought, is not a privileged communication. *Mauk* v. *Brundage*, 67 N. E. Rep. 152 (Ohio).

Statements made during judicial proceedings are absolutely privileged only if pertinent and material to the issue. See *McLaughlin* v. *Cowley*, 127 Mass. 316. The court in the principal case applies the same rule to statements in ordinances passed by a board of health, overlooking the fact that the making of such ordinances is from its nature a legislative, not a judicial proceeding. Considerations of public policy have made all acts of the members of a state legislature in the execution of their office abso-

lutely privileged. See *Coffin* v. *Coffin*, 4 Mass. 1. It seems doubtful if the absolute privilege which public policy accords to legislators should be extended to the members of a board of health. But acts done in discharge of public official duty are at least conditionally privileged, and proof of actual malice is necessary to rebut the privilege. See *Mayo* v. *Sample*, 18 Ia. 306. No malice appears in the principal case, and therefore the publication seems to have been privileged. Thus both the decision of the court and the grounds by which it was reached seem questionable.

LIMITATION OF ACTIONS — SAVING CLAUSE IN STATUTE — REMOVAL OF DISABILITY. — A saving clause in the statute of limitations allowed a *feme covert* to sue for the recovery of real property within three years after the removal of the disability. and a later statute removed all of her disabilities, except for an express reservation forbidding her to make an executory contract to sell land unless her husband joined. *Held*, that she does not lose the benefit of the saving clause. *Higgins* v. *Stokes*, 74 S. W. Rep. 251 (Ky.).

The weight of authority holds that where married woman's acts remove all the disabilities of a *feme covert*, their effect is either to take her out of the saving clause in statutes of limitation of actions, or impliedly to repeal so much of them as excepts married women from their operation. *Percy* v. *Cockrill*, 53 Fed. Rep. 872; *Garland County* v. *Gaines*, 47 Ark. 558. Curiously enough, however, it has generally been decided, on various grounds, that where statutes give her, among other rights, that to sue and be sued, but do not completely remove her disabilities, she will still be permitted to take advantage of the saving clause. *Lindell Real Estate Co.* v. *Lindell*, 142 Mo. 61. The present case, however, is one of the first in which the relatively minor disability which remains is made the basis of the decision. So slight a foundation seems hardly sufficient to support a rule so unnecessarily partial to the interests of married women. It would seem more reasonable that when all of her disabilities with reference to which the saving clause was inserted are removed, a married woman should be treated, for purposes of bringing suit, as if sole. *Brown* v. *Cousens*, 51 Me. 301.

MALICIOUS PROSECUTION — PRELIMINARY INJUNCTION AS EVIDENCE OF PROBABLE CAUSE. — *Held*, that a preliminary injunction, granted upon affidavits and after argument, is not sufficient evidence of probable cause to defeat an action for malicious prosecution. *Burt* v. *Smith*, 84 N. Y. App. Div. 47.

A judgment, properly obtained, is conclusive evidence of probable cause, even though subsequently reversed. *Crescent Live Stock Co.* v. *Butcher's Union*, 120 U. S. 141. So the fact that one, after a full and honest statement of facts, acted *bona fide* on the advice of an attorney makes out probable cause. *Stewart* v. *Sonneborn*, 98 U. S. 187. A preliminary injunction is neither final nor decisive, being simply to prevent irreparable mischief pending subsequent investigation. See *Attorney-Gen'l* v. *Paterson*, 9 N. J. Eq. 624. Evidently, then, the reasons making a judgment conclusive as to probable cause are lacking in the case of preliminary injunctions Nor does it seem that they should be given the weight of legal advice. Such an injunction is not necessarily dependent upon the merits of the cause, as is the opinion of counsel; and it is granted on affidavits, which may be untrustworthy. See *Johnson* v. *Comm'rs of Wilson Co.*, 34 Kan. 670. The attorney, on the other hand, must base his decision on a complete and honest statement of the facts if it is to be a defense. On principle, then, there seems to be no reason to question the soundness of the decision in the principal case.

MASTER AND SERVANT — NATURE OF THE RELATION — DOCTRINE OF RESPONDEAT SUPERIOR. — The plaintiff was injured through the negligent management of a Lehigh train, operating over the defendant's tracks under a contract making such trains subject to the exclusive control of the defendant. *Held*, that the defendant is liable on the doctrine of *respondeat superior*. *Decker* v. *Erie Railroad Co.*, 85 N. Y. App. Div. 13. See NOTES, p. 51.

MUNICIPAL CORPORATIONS — ALIENATION OF PUBLIC PROPERTY. — Certain tax-payers brought a bill for an injunction against the City of Valparaiso to restrain it from selling a right to purchase the property of a water company, which right had been reserved to the city in the ordinance granting the company its franchise. The answer, which was demurred to, alleged that the city, being in need of financial aid, had made a more favorable contract for water with a new company. *Held*, that as the right of purchase has never been exercised for public purposes it has not become a public trust and may be sold. *De Motte* v. *City of Valparaiso*, 67 N. E. Rep. 985 (Ind., Sup. Ct.).

It is well settled that a municipal corporation may, under its general powers, alienate its property, except that dedicated to public purposes, as are public waterworks, and that held in trust for public use. *Lake County Water and Light Co.* v. *Walsh*, 65 N. E. Rep. 530 (Ind.); *City of Fort Wayne* v. *Lake Shore, etc., R. Co.*, 132 Ind. 558. The question in the principal case is, therefore, whether this right to purchase waterworks is so held for the benefit of the inhabitants that it assumes the character of a present public trust; or whether it is to be regarded as a city asset, potentially rather than actually of public benefit. The question is new; either view appears theoretically possible; and the protection of the public interests is the only question: consequently a decision on grounds of expediency seems fitting. As such, the decision of the court commends itself and is not without precedent. In New York, when a city ferry was about to be superseded by a bridge, the court on grounds of public policy called the real property used with the ferry private rather than public and allowed the city to sell. *People of the State of New York* v. *City of Albany*, 4 Hun (N. Y.) 675. See also *United States* v. *Case Library*, 98 Fed. 512.

OFFER AND ACCEPTANCE — IMPLIED AUTHORIZATION OF ACCEPTANCE BY MAIL. — The defendant company, through its agent the plaintiff, submitted to a third party living in another town a proposition of sale. The offeree mailed a letter to the defendant company accepting the offer, but intercepted this letter by telegraph before delivery. The plaintiff sued to recover his commission. *Held*, that the plaintiff is not entitled to a commission, since there is no contract. *Scottish-American Mortg. Co., Ltd.*, v. *Davis*, 74 S. W. Rep. 17 (Tex., Sup. Ct.).

It is well settled that, when an offer has been made by mail, the placing of the acceptance in the postoffice marks the completion of the contract. *Vassar* v. *Camp*, 11 N. Y. 441; *Household Fire, etc., Ins. Co.* v. *Grant*, 4 Ex. Div. 216. The reason for this rule, namely, that acceptance by mail is impliedly authorized from the sending of the offer by letter, would extend to cases in which authorization can be implied from any acts whatsoever of the parties. In England acceptance takes effect upon mailing, wherever the parties, although not impliedly authorizing the use of the mail by their acts, would nevertheless naturally contemplate the post as a possible means of acceptance. *Henthorn* v. *Fraser*, [1892] 2 Ch. 27. The principal case seems squarely opposed to the English doctrine. On principle, since the mail now affords the usual means of business communication, it should be treated as an authorized mode of acceptance wherever there is no provision to the contrary, either expressed or implied. Accordingly the doctrine of *Henthorn* v. *Fraser* seems preferable to that of the principal case.

PAR DELICTUM — ONE PARTY ONLY INDICTABLE. — An editor, travelling on a pass, was injured by the negligence of the railroad. A statute made it criminal to issue such a pass, and imposed a fine upon all companies which did so, but did not make indictable the user of the pass. *Held*, that the editor cannot recover, since he was a party to an illegal contract. *McNeill* v. *Durham & C. R. Co.*, 44 S. E. Rep. 34 (N. C.). See NOTES, p. 53.

PAR DELICTUM — RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT. — The plaintiff entered into an illegal insurance contract with the defendant, acting upon representations made by the defendant's agent that such insurance was valid. The agent made the representation in good faith, being mistaken as to the law governing such policies. *Held*, that, as the plaintiff has a right to depend upon the defendant's agent for a knowledge of insurance law, the parties are not *in pari delicto*, and the plaintiff can recover premiums paid under the illegal contract. *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92.

The familiar rule that no recovery is allowed on quasi-contractual grounds between parties *in pari delicto* is difficult to apply, because of the uncertainty as to the meaning of *par delictum*. It is settled that parties are not *in pari delicto* where the law violated by them was designed to protect the one against the other, or where there existed between them the relation of oppressor and oppressed. See *Browning* v. *Morris*, 2 Cowp. 790. The principal case goes further, and finds the parties not *in pari delicto* where one puts faith in the other's supposedly superior knowledge of the lawfulness of the act. But this is so likely to be the case in any illegal transaction that the proposed exception would practically destroy the rule. Even in jurisdictions where money paid under a mistake of law may be recovered the case could hardly be supported, for surely that rule cannot apply to money paid under a contract made in violation of the law. It would seem, therefore, that the court in the principal case might well have reached an opposite conclusion.

PREFERENCES — BANKRUPTCY ACT — PARTIAL PAYMENTS ON RUNNING ACCOUNT. — Payments had been made on a running account. New sales followed, the net result of which was to increase the bankrupt's estate. *Held*, that such payments are not preferential transfers. *Juquith* v. *Alden*, 23 Sup. Ct. Rep. 649.

For a discussion of the principles involved see 15 HARV. L. REV. 669.

PURCHASE FOR VALUE WITHOUT NOTICE — EXECUTION CREDITOR PURCHASING AT HIS OWN SALE. — A judgment creditor of a trustee caused the land held in trust for the plaintiff to be sold, and purchased it himself, at the execution sale. *Held*, that the land is subject to the trust. *Beidler* v. *Beidler*, 74 S. W. Rep. 13 (Ark.).

Since the burden of showing notice is on the *cestui*, and no notice was shown, the defendant must be taken to have acted innocently. *Molony* v. *Rourke*, 100 Mass. 190. It is well settled that a third person purchasing innocently at a sheriff's sale takes free of all equities. *Landell's Appeal*, 105 Pa. St. 152. The principal case in refusing to apply the same rule to the judgment creditor is in accordance with the weight of authority. *Wright* v. *Douglass*, 10 Barb. (N. Y.) 97; *Williams* v. *McIlroy*, 34 Ark. 85. The courts proceed upon the ground that a judgment creditor buying without notice at his own sale is not a purchaser for value. This position seems questionable. The creditor may, it is true, pass over no money on his bid, but as a consequence of the transaction he does release his judgment claim. The result is in no way different from that which would have been reached had he paid cash to the sheriff and received it back in satisfaction of the judgment. Following this reasoning, some courts have held that the judgment creditor purchasing in good faith at the execution sale acquires a clear title, a conclusion which seems preferable to that of the principal case. *Pugh* v. *Highley*, 152 Ind. 252; *Gower* v. *Doheney*, 33 Ia. 36.

SEDUCTION — EFFECT OF SUBSEQUENT MARRIAGE. — The defendant was indicted under a statute punishing seduction under promise of marriage. Subsequently to the seduction the defendant had married and deserted the complainant. *Held*, that the marriage is no bar to the prosecution. *In re Lewis*, 73 Pac. Rep. 77 (Kan.).

It seems clear that the crime in the principal case was the seduction. As, in point of law, the state is the party injured by a crime, the woman could not condone the offense. *Barker* v. *Commonwealth*, 90 Va. 820. Nor can any past act be recalled; nor is it ordinarily a defense that the criminal has mitigated the effects of his crime after its commission. Hence, logically, the principal case appears sound. See *State* v. *Bierce*, 27 Conn. 319, 324. Yet the desirability of inducing marriage between the parties and thereby repairing in large measure the injury to the woman's reputation, has usually led the courts to an opposite decision as a matter of public policy. *State* v. *Otis*, 135 Ind. 267. Even as a matter of policy, however, it seems questionable whether the subsequent marriage should be treated as an absolute defense; for the end desired would seem to be more effectively reached by merely refraining from the prosecution in cases where the defendant was willing in good faith to fulfil his marital obligations, still reserving the power to prosecute where, as in the principal case, the defendant has gone through the form of marriage merely to escape responsibility.

SELF-DEFENSE — LOSS OF RIGHT THROUGH PROVOKING ASSAULT BY OPPROBRIOUS LANGUAGE. — The defendant, having by the use of abusive language provoked an attack by the prosecuting witness, sought to justify the use of violence in the ensuing affray, on the ground of self-defense. *Held*, that the defendant cannot justify on that ground. *Shaw* v. *State*, 73 S. W. Rep. 1046 (Tex.).

The justification of self-defense is denied where the defendant, by actual or threatened violence, provokes an assault *Johnson* v. *State*, 69 Ala. 253. The same rule has been applied where the defendant, by use of language, provoked a fight in order to injure his adversary. See *Stewart* v. *State*, 1 Oh. St. 66. In such cases, taking away the right of self-defense seems justifiable. In either case the defendant has intentionally caused a breach of the peace, and is not a person entitled to the favor of the law. Where, however, the defendant has not intended to provoke a fight, there seems no reason for withdrawing from him the ordinary right of self-defense and leaving him at the mercy of the attacking person. For this reason, the decision of the court in the principal case seems perhaps doubtful.

TORTS — INTERFERENCE WITH BUSINESS — CONTRACT RIGHTS. — The executive council of the defendant union, whom the members had asked for advice, ordered a holiday in order indirectly to raise the wages of members, but without ill will towards the plaintiffs. In consequence, the employees of the plaintiff company left work, in violation of their contracts. *Held*, that the union is liable for the resulting damage.

Vaughan Williams, J., dissented. *Glamorgan Coal Company* v. *South Wales Miners' Federation*, 19 T. L. R. 701 (Eng., C. A.).

The doctrine that it is unlawful to induce another to break his contracts, unless justification is shown, appears fairly well established. *Read* v. *Friendly Society of Stone Masons*, 71 L. J. K. B. 994. What constitutes a justification is uncertain, but it seems clear that mere absence of ill will is insufficient if the defendant's motive is subservience of a selfish interest. *Lumley* v. *Gye*, 2 E. & B. 216. In the principal case the union defended upon the ground that it gave disinterested advice acting under a moral duty. In the absence of other facts, this might constitute a justification. See the dissenting opinion of Vaughan Williams, J. But the union not only advised the members to break their contracts, but ordered them to do so. Moral duty might have justified the advice, but it could not well justify an order which the members of the union would not dare to disobey. Nor does it seem possible for the union to say that it was disinterested, since its underlying motive was to regulate production for its own advantage. The principal case forms an important, and, it would seem, a sound addition to the law upon the subject.

VENDOR AND PURCHASER — FORFEITURE. — In a contract for the sale of land time was stipulated to be of the essence, and the vendee in case of default agreed to forfeit payments already made. *Held*, that the vendor may maintain ejectment against the vendee in default without returning former payments. *Williams* v. *Long*, 72 Pac. Rep. 911 (Cal.). See NOTES, p. 48.

WATERS AND WATERCOURSES — APPROPRIATION FOR IRRIGATION — DISREGARD OF STATE LINES. — The plaintiffs appropriated water from a stream rising in Montana and flowing into Wyoming, by constructing a ditch running from a head-gate in Wyoming across the state line into Montana, where land of two of the plaintiffs was situated. Subsequently the defendants began taking water from the stream at points above the plaintiffs' head-gate, to irrigate their land in Wyoming. *Held*, that the defendants will be enjoined from diverting waters of the stream to the injury of the plaintiffs. *Willey* v. *Decker*, 73 Pac. Rep. 210 (Wyo.).

The court recognizes a right to take water from a stream in one state for application to lands in another. No previous decision has been found upon this exact point. In a case involving similar facts the supreme court of Colorado left expressly undecided the question of rights of certain New Mexican irrigators in Colorado streams. *Lamson* v. *Vailes*, 27 Col. 201. A Utah decision, however, contains a *dictum* in accord with the principal case. See *Conant* v. *Deep Creek, etc., Irrigation Co.*, 23 Utah 627. The common-law rule of riparian rights has never been in force in Wyoming. Necessity and custom have created a law peculiar to the arid regions of the West, under which priority of appropriation for beneficial use is the sole test of right. *Moyer* v. *Preston*, 6 Wyo. 308. The decision in the principal case but recognizes this fundamental principle of Western law, for both custom and the needs of the case led early settlers to disregard state lines in their irrigating schemes. It is to be hoped that other states will follow the lead of Wyoming in this simple solution of a vexed problem.